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NO. 85-1442

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner,

-vs-

EDNA JOHNSON, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION

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The Secretary's pending petition for certiorari (filed February, 1986) requested that the petition "be held and disposed of as appropriate in light of the Court's decisions on the jurisdictional issues in Bowen v. City of New York, No. 84-1923, and Bowen v. Owens, No. 84-1905, and in light of the Court's disposition of the petition for a writ of certiorari raising the question of the validity of the severity regulations in Bowen v. Yuckert, pet. for cert. pending No. 85-1409." (Pet. at 14).

This Court subsequently decided Owens without reaching the jurisdictional issues. 476 U.S. ___, 106 S. Ct. 1881 (1986). It did, however, reach these issues in City of New York, 476 U.S. ___, 106 S. Ct. 2022 (1986).

In Yuckert, the Court granted the petition for certiorari, ___ U.S. ___, 106 S. Ct. 1967 (1986), and has heard oral argument. Disposition of the petition here respecting the question of the validity of the severity regulation thus awaits the ruling in Yuckert.

On April 7, 1987, respondent in Yuckert sought leave to file a supplemental brief calling attention to a recently

discovered Social Security Administration ("SSA") memorandum. That memorandum (the "Step Two Memorandum") interpreted SSR 85-28 in a manner contradicting the Solicitor General's representations to this Court on oral argument in Yuckert. See Yuckert Supp. Br. at 3-4. The Secretary subsequently sought leave to file a responsive supplemental brief. This Court has now granted leave to file both supplemental briefs in Yuckert.

Sup. Ct. R. 22.6 provides that "[a]ny party may file a supplemental brief at any time while a petition for certiorari is pending calling attention to ... intervening matter not available at the time of the party's last filing ...." The Step Two Memorandum and the Secretary's supplemental brief in Yuckert (which both refer specifically to this case), together with Ms. Yuckert's supplemental brief, are all highly relevant "intervening matter[s]" within the meaning of this rule, given the great likelihood that this case will be disposed of "in light of" the ruling in Yuckert. (Pet. at 14). Accordingly, respondents may file this supplemental brief, restricted to these matters.

A. The Solicitor General, in his supplemental brief in Yuckert, disavows the Step Two Memorandum, asserting that it does not represent the "offical position" of the Secretary respecting SSR 85-28 (Secretary's Supp. Br. at 2). The official position, he says, is the one he advanced at oral argument and now renews in his supplemental brief. (Id. at 2, 6).

The post hoc views of appellate counsel respecting what SSA meant to accomplish through SSR 85-28 are surely entitled to less deference than the contemporanous understanding of an agency official (Associate Commissioner, Office of Hearings and Appeals) specifically charged with making adjudications under that ruling. See Motor Vehicle

Manufacturing Assn. v. State Farm Mutual, 463 U.S. 29, 50 (1983); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 169 (1962). At best for the Secretary, however, the two competing understandings of SSR 85-28 (one by an agency official, the other by the Solicitor General) suggest that the SSA itself has not finally decided how SSR 85-28 should be applied, or, at least, that there are conflicting understandings within SSA itself as to the appropriate application of the ruling. In this context, deciding Yuckert, and this case, based upon any particular understanding of SSR 85-28 would have this Court abrogate a decision that is properly the agency's to make. As Ms. Yuckert suggests (Yuckert Supp. Br. at 2-4), this Court thus should not interpret or reach the validity of SSR 85-28, if it resolves the merits of the severity step question in its Yuckert ruling. And, if it remands Ms. Yuckert's case for further action in light of SSR 85-28, that would afford the Secretary an opportunity to clarify any confusion respecting the appropriate application of SSR 85-28, which has never governed the adjudication of Ms. Yuckert's claim in any forum.

B. If the Solicitor General's understanding of SSR 85-28, as explained in the Secretary's supplemental brief, does accurately reflect SSA's understanding and application of that ruling, then the Secretary has confirmed that SSA's policy is at odds with what every court of appeals says the Social Security Act requires. Every court of appeals has held that a claimant meets his prima facie burden of proof by showing that he has an impairment that prevents him from performing his past work. See Respondents' Op. Cert. Br. at 21. Under the Solicitor's understanding of SSR 85-28, however, SSA policy is unequivocally that such a showing will not suffice to meet that burden, except in the few

cases in which the claimant's past work is in some way "unique." See Secretary's Supp. Br. at 10-11. The same understanding, in turn, amounts to a formal disavowal by the Secretary of McDonald v. Heckler, 795 F.2d 1118 (1st Cir. 1986) (on which he previously relied, see Yuckert Br. for Petitioner at 17, 27, 29), where the court imposed a narrowing interpretation of SSR 85-28, to bring it into line with the requirements of the Act. */

C. Insofar as the petition here sought review of jurisdictional issues, the Secretary, as noted, initially sought to have it held and disposed of in light of the ruling in City of New York. Having lost that case, unanimously, and anticipating the possibility of a remand here for reconsideration of the severity step question in light of SSR 85-28, the Secretary now urges that:

> [S]hould the Court ... decide to dispose of respondent's case [by remanding it to the Secretary for reconsideration in light of SSR 85-28], we urge the Court to make clear that such a disposition was deemed appropriate here only because this case involved an individual claimant who pursued her administrative and judicial remedies in a timely fashion. A similar order would not be appropriate in a class action with respect to class members who failed to seek review in a

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*/ The Secretary's petitions for certiorari here and in Yuckert invoked an asserted split among the circuits as to the severity step question, and he pressed that asserted conflict in his briefs in Yuckert. But respondents here and Ms. Yuckert both have consistently urged that there was no circuit conflict worthy of this Court's attention, and that for this reason certiorari should be denied, or the writ dismissed as improvidently granted. (Respondents' Op. Cert. Br. at 17-20; Yuckert Br. for Respondent at 17-18, 44-5.) The Secretary, of course, has never accepted the propriety of either of these dispositions. But if the policy he sets forth in his supplemental brief in Yuckert is at variance with the one approved by all the appellate courts, that emphasizes the absence of any relevant split among the circuits. Moreover, the Step Two Memorandum, if credited, establishes as well that there was and is no material conflict between SSA's step two policy and the various circuit court decisions -- and thus no relevant issue, at the time certiorari was granted in Yuckert or since, deserving of this Court's attention.

> timely fashion and who thereby allowed a preliminary administrative decision denying their claims under the severity regulation to become final and binding.

Secretary's Supp. Br. at 11-12 (citing, in the same paragraph, this case as an example of the type of class action specified). The Secretary thereby seeks in Yuckert a declaration as to class jurisdictional issues not presented there, which he hopes to employ on remand against the class claimants here and in other cases.

This Court should reject that ploy. If the decisions in the class cases the Secretary identifies are to be reconsidered in the lower federal courts, insofar as the jurisdictional issues are concerned, then they should be reconsidered in light of City of New York. The Secretary himself originally suggested that this was appropriate. (Pet. at 14). It is, given that these issues were fully briefed and argued in that case. Any remand order in Yuckert should not be muddied by a jurisdictional declaration, when no jurisdictional issues have ever been argued -- or indeed could be raised -- in that case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert E. Lehrer, a member of the Bar of this Court, hereby certify that on this 22nd day of April 1987, three (3) copies of Respondents' Supplemental Brief in Opposition to Petition for a Writ of Certiorari, were served upon the Hon. Charles Fried, Solicitor General, Department of Justice, Washington, D.C. 20530, Attn: Edwin S. Kneedler, Asst. to the Solicitor General, who is the attorney for the petitioner. Service was made by mailing these copies, by overnight mail (Federal Express) to Mr. Fried at the address indicated. I further certify that all parties required to be served have been served.

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